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No.

In the Supreme Court of the United States

October Term, 1982

MID-AMERICA DAIRYMEN, INC.,
Petitioner,

vs.

THE NATIONAL FARMERS' ORGANIZATION, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether, in the absence of proof of a relevant geographic market, there can be established (a) a conspiracy to monopolize under Section 2 of the Sherman Act, from which (b) an unreasonable restraint of trade under Section 1 of the Sherman Act can automatically follow.

2. Whether a conspiracy to monopolize under Section 2 of the Sherman Act may be premised solely on activity that is lawful and exempt from the antitrust laws under either the *Noerr-Pennington* doctrine or the Capper-Volstead Act.

3. Whether the antitrust exemption afforded agricultural cooperatives under the Capper-Volstead Act extends to an organization that includes as members non-farmers who are not middlemen engaged in the distribution of agricultural products.

This Petition presents only the foregoing three Questions. Petitioner Mid-America Dairymen, Inc. also adopts three additional Questions presented to the Court in petitions being filed by co-petitioners Associated Milk Producers, Inc. and Central Milk Producers Cooperative. The three additional Questions Presented arising out of the opinion below, as developed in the other petitions, are:

4. Whether the Court of Appeals usurped the fact-finding functions of the trial court in derogation of Rule 52(a) of the Federal Rules of Civil Procedure.

5. Whether a not-for-profit membership association has standing under Section 4 of the Clayton Act to recover "lost" dues and fees of prospective members.

6. A. Whether an award of attorneys' fees pursuant to Section 4 of the Clayton Act should be apportioned to accurately reflect the extent to which a party has prevailed on the merits.

B. Whether Section 4 of the Clayton Act precludes the recovery of expenses of litigation not specifically identified as costs under Rule 54(d) of the Federal Rules of Civil Procedure and 28 U.S.C. §1920.

THE PARTIES*

In addition to the parties named in the caption of this Petition, the following were defendants-appellees: Associated Milk Producers, Inc., a dairy cooperative; Central Milk Producers Cooperative, a cooperative federation of dairy cooperatives located in Wisconsin and Illinois; and Associated Reserve Standby Pool Cooperative, Inc., a cooperative federation of dairy cooperatives located in the southern and central parts of the country.

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*Petitioner, Mid-America Dairymen, Inc., pursuant to Supreme Court Rule 28.1, hereby lists the following affiliated companies: Clearfield Cheese Company, Hiland Dairy Company, Roberts Dairy, Inc., and Western Foods Processing, Inc. Petitioner has no parent or subsidiary companies within the meaning of Rule 28.1.

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No.

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vs.

THE NATIONAL FARMERS' ORGANIZATION, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, Mid-America Dairymen, Inc., prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this matter on August 31, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 687 F.2d 1173 (8th Cir. 1982). The opinion of the United States District Court for the Western District of Missouri is reported at 510 F. Supp. 381 (W.D. Mo. 1981). These opinions are reproduced in the Petition for Writ of Certiorari, Appendices A and B respectively, filed February 8, 1983, No. 82-1324, *The National Farmers' Organization, Inc. v. Associated Milk Producers, Inc., et al.*

JURISDICTION

The Eighth Circuit entered judgment on August 31, 1982. The Court of Appeals denied Petitioner's timely Petition for Rehearing and Suggestions for Rehearing En Banc on November 10, 1982 (App. D to the Petition for Writ of Certiorari filed by The National Farmers' Organization, Inc., No. 82-1324). Circuit Judge Ross indicated, however, that he "would grant the petitions."

On January 28, 1983, Justice Blackmun extended the time within which to file a petition for writ of certiorari to and including March 10, 1983; on February 25, 1983, said time for filing was further extended by Justice Blackmun to March 25, 1983. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. §1, as amended, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

Section 2 of the Sherman Act, 15 U.S.C. §2, as amended, provides in pertinent part:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony. . . .

Section 4 of the Clayton Act, 15 U.S.C. §15, as amended, provides in pertinent part:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Section 6 of the Clayton Act, 15 U.S.C. §17, provides:

> The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

The Capper-Volstead Act, 7 U.S.C. §291, provides in pertinent part:

> Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes. . . .

STATEMENT OF THE CASE

A. Background

The issues for which review is sought arise out of antitrust litigation filed in the Western District of Missouri. The first phase of the trial involved the claims of Petitioner, Mid-America Dairymen, Inc. ("Mid-Am"), against The National Farmers' Organization, Inc. ("NFO"), for violations of Section 1 of the Sherman Act and Section 4 of the Clayton Act. The second phase involved NFO's counterclaim against Mid-Am and Associated Milk Producers, Inc. ("AMPI"), which are dairy marketing cooperatives, and Central Milk Producers Cooperative ("CMPC") and Associated Reserve Standby Pool Cooperative, Inc. ("ARSPC"), which are marketing federations of dairy cooperatives, for alleged violations of Sections 1 and 2 of the Sherman Act and Sections 4 and 16 of the Clayton Act.[1]

Beatrice Foods Co., a proprietary milk processor, was a defendant in Mid-Am's suit and in NFO's counterclaim, but was dismissed as a party by Mid-Am in 1976 and NFO in 1977, approximately five years after the case commenced.

Petitioner Mid-Am is an incorporated cooperative marketing association engaged in the assembling for market, marketing, processing and distribution of milk on behalf of its approximately 11,500 dairy farmer members. Mid-Am's dairy farmer members are located in twelve states.[2] Each member of Mid-Am is actively engaged in the production of raw milk.

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1. The third phase consisted of AMPI's claims against NFO, which are not involved in this Petition.

2. Arkansas, Illinois, Iowa, Kansas, Minnesota, Missouri, Nebraska, North Dakota, Oklahoma, South Dakota, Texas, Wisconsin.

Respondent, The National Farmers' Organization, Inc. ("NFO"), was organized in 1955 under the not-for-profit corporation laws of Iowa. Although NFO was originally organized as a protest organization, in 1957 it sought to become a "bargaining association" on behalf of its members in all phases of agriculture. Since 1969, NFO has negotiated livestock sales of at least $500 million annually and grain sales of at least $100 million annually.

B. District Court Proceedings

In March, 1971, this suit was commenced by Mid-Am,[3] seeking treble damages and injunctive relief for alleged violations of Sections 1 and 2 of the Sherman Act, together with federal and state law claims for inducement of breach of Mid-Am's cooperative marketing contracts with its members by NFO and Beatrice Foods Co.

Mid-Am alleged an agreement and conspiracy between NFO and a proprietary milk dealer, Beatrice Foods Co., whereby more than 100 dairy farmer members of Mid-Am had been induced to jointly cease marketing their milk through Mid-Am in violation of their written cooperative marketing agreements and had begun to sell their milk to Beatrice under a contract negotiated by NFO.

NFO counterclaimed against Mid-Am and joined AMPI, CMPC, ARSPC and Beatrice as additional defendants, alleging unlawful monopolization, attempted monopolization and conspiracy to monopolize in violation of

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3. The Mid-Am Board of Directors brought the case as a class action under Eighth Circuit precedent governing cooperative plaintiffs. *Farmers Co-op Oil Co. v. Socony-Vacuum Oil Co.*, 133 F.2d 101 (8th Cir. 1942). The class action claims were subsequently dropped, and Mid-Am continued as the sole plaintiff.

Section 2 of the Sherman Act, and a conspiracy to unreasonably restrain trade in violation of Section 1.[4]

At trial, Mid-Am sought to recover on the ground that NFO's marketing activities were unlawful price fixing agreements and *per se* violations of Section 1 of the Sherman Act. Even though NFO had a number of members who were not engaged in the production of agricultural commodities, NFO claimed an antitrust exemption under the Capper-Volstead Act and Section 6 of the Clayton Act. The District Court held that the marketing of milk by NFO did not constitute price fixing, and therefore did not violate the antitrust laws. In view of that holding, the Court further concluded that it was unnecessary to decide whether NFO should be afforded an antitrust exemption. The District Judge noted, however, that had he been required to reach that issue, he "would have rejected NFO's proposed Capper-Volstead Act" exemption because NFO had non-farmer members. 510 F. Supp. at 426, App. B at 155a.

With respect to the NFO counterclaim, the District Court concluded that NFO had failed to sustain its burden of proof on all issues and entered judgment in favor of Mid-Am, AMPI, CMPC and ARSPC.[5] Specifically, the District Court, in the course of stating 23 separate conclu-

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4. The initial counterclaim was filed as a class action by NFO and a group of its officers and members. NFO's class action certification motion was denied without prejudice prior to trial and no appeal of that determination was taken.

5. Trial of the NFO counterclaim consumed approximately 18 months, and involved over 70 live witnesses, 5,000 exhibits and the deposition testimony of over 200 witnesses. The District Court considered 2,017 proposed findings of fact submitted by NFO and accepted or rejected those findings (510 F. Supp. at 436-501, App. B at 175a-316a), noting that because of its determination that NFO had failed to carry the burden of proof on issues of liability, "it is neither necessary nor appropriate to deal separately with the 8,423 paragraphs" of the defendants' proposed findings of fact. 510 F. Supp. at 435, App. B at 174a.

sions of law, held that NFO failed to establish that any of the defendants monopolized, or attempted, combined or conspired to restrain or monopolize the marketing of milk in any properly defined relevant market in violation of Sections 1 and 2 of the Sherman Act. 510 F. Supp. at 502-03, App. B at 318a-320a.

C. Court of Appeals Proceedings

All parties appealed. With respect to Mid-Am's claims against NFO, the Court of Appeals found that NFO's milk marketing activities did constitute horizontal price fixing, and that such conduct, unless exempt, was a *per se* violation of the Sherman Act. However, notwithstanding the undisputed fact that NFO had a number of non-farmer members during the period of time in issue, the Eighth Circuit held that NFO was entitled to an exemption under the Capper-Volstead Act for its price fixing activities.

With respect to NFO's counterclaim, the Court of Appeals sustained the District Court's findings and conclusions that NFO had failed to establish actual or attempted monopolization in violation of Section 2 of the Sherman Act, in part because NFO had failed to establish a relevant market. The Eighth Circuit, however, reversed the District Court's findings regarding a Section 2 conspiracy to monopolize on the ground that relevant market is not a necessary element of such a claim. The Court then concluded that "an unlawful conspiracy under Section 2 necessarily violates Section 1 as an 'unreasonable' restraint of trade." 687 F.2d at 1193, App. A at 30a.

The Court of Appeals stated that "AMPI, CMPC and Mid-Am are the major marketers of raw milk produced in the Midwest" (687 F.2d at 1192, App. A at 29a), relying solely on statistical data obtained and introduced by NFO in the middle of trial, which principally involved USDA

milk pooling statistics,[6] and which covered only ten of the twenty Federal Milk Orders in a ten-state "Midwest" region.[7] The Eighth Circuit recognized that no "properly defined market or submarkets" had been proven (687 F.2d at 1192, App. A at 29a), but concluded that none need be shown, as a conspiracy to monopolize claim required only a "minimal showing of product and geographic context." 687 F.2d at 1182, App. A at 8a.

In arriving at the conclusion that a "conspiracy" existed in violation of Section 2 of the Sherman Act, the only evidence of joint or concerted action considered by the Eighth Circuit was activity admittedly exempt from the antitrust laws under the *Noerr-Pennington* doctrine and the Capper-Volstead Act. Those exempt actions included (1) joint marketing agreements between Mid-Am and AMPI, (2) joint petitioning of the United States Department of Agriculture, and (3) joint membership between Mid-Am and AMPI, and between CMPC and AMPI. Even though the Court of Appeals conceded that these activities were antitrust-exempt, it effectively ruled that such exempt conduct could be used as a basis for determining whether or not a conspiracy existed. Other than this exempt conduct, the Eighth Circuit relied solely

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6. NFO had obtained this unsubstantiated data *ex parte* from the USDA, and offered it as evidence of "market shares." In view of its decision against NFO on the merits, the District Court never ruled on the counterclaim defendants' objections to the admissibility of this data based upon lack of foundation, surprise or its inaccuracy. Both the District Court and the Court of Appeals rejected this data as insufficient to prove relevant market.

7. The Federal Milk Orders do not reflect in any way the total volume of milk produced in a given geographic area. Moreover, those statistics bear no direct relationship to the percentage of milk available and the percentage of sales in a given area. Additionally, NFO presented data for only a few Orders within the "Midwest," ignoring many large-volume markets both within the "ten-state" region and in other areas where the parties marketed milk.

on *individual* acts of the counterclaim defendants to show furtherance of the conspiracy.[8] Even the majority of this unilateral conduct was found to be exempt, including petitioning of state governments and litigation with NFO over membership rights.[9]

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8. The Court of Appeals also considered two findings of the District Court that (1) on October 19, 1970, following an ARSPC board meeting, representatives of AMPI, Mid-Am, and DI (another dairy marketing cooperative not a party to this litigation) met to discuss similar experiences that these three cooperatives had relative to NFO's solicitation or inducement of their members and NFO's marketing of milk at cut-rate prices (510 F. Supp. at 480, App. B at 271a); and (2) a general finding that both Mid-Am and AMPI were concerned about NFO's milk program and their officials discussed that concern (510 F. Supp. at 469, App. B at 216a).

Not only did these meetings involve exempt conduct, but they could never, standing alone, support a finding that the counterclaim defendants either conspired or had the specific intent to monopolize, two key elements of the Section 2 violation alleged in this case. *See, e.g., Richter Concrete Corp. v. Hilltop Concrete Corp.*, 691 F.2d 818, 827 (6th Cir. 1982). Moreover, "a mere showing of close relations or frequent meetings between the alleged conspirators . . . will not sustain a plaintiff's burden absent evidence which would permit the inference that those close ties led to an illegal agreement." *Oreck Corp. v. Whirlpool Corp.*, 639 F.2d 75, 79 (2d Cir. 1980), *cert. denied*, 454 U.S. 1083 (1981); *accord, H.L. Moore Drug Exchange v. Eli Lilly & Co.*, 662 F.2d 935, 941 (2d Cir. 1981), *cert. denied*, 103 S.Ct. 176 (1982).

9. The Eighth Circuit repeatedly made *de novo* factual determinations on appeal, many with respect to factual disputes that the District Court had found it unnecessary to resolve. The Court of Appeals' consideration of fact questions raised for the first time on appeal required at the very least a remand to the District Court for further factual findings. This failure to remand violated the principles enunciated in *Pullman-Standard v. Swint*, 456 U.S. 273 (1982).

REASONS FOR GRANTING THE WRIT

I. The Decision Below Highlights a Major Conflict Among the Circuits and Raises Novel and Important Questions Concerning the Need for Proving a Relevant Market Under Sections 1 and 2 of the Sherman Act.

A. Conflict Among the Circuits

A dramatic conflict exists among the various Circuits as to whether proof of relevant market is necessary to prove a conspiracy to monopolize under Section 2 of the Sherman Act. The Eighth Circuit in the present case has ruled that such proof is *not* necessary, 687 F.2d at 1181, App. A at 8a:

> A Section 2 claim for conspiracy to monopolize, however, generally does not require proof of a relevant market, at least not in the manner required in actual and attempted monopolization cases.

This holding was critical to the Court's *de novo* finding that the counterclaim defendants, including Mid-Am, had conspired to monopolize in violation of Section 2, since the Court conceded that no proper relevant market had been shown. 687 F.2d at 1192, App. A at 28a-29a.

The Eighth Circuit's holding adds to and highlights the existing conflict among the Circuits as to whether proof of relevant market is necessary in a Section 2 conspiracy to monopolize case. The Circuits are almost evenly divided on this issue:[10]

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10. Petitioner Mid-Am has been unable to find any cases dealing squarely with this issue in the First Circuit.

Circuits holding proof of relevant market necessary

Third Circuit: *Fleer Corp. v. Topps Chewing Gum, Inc.*, 658 F.2d 139, 153-54 (3d Cir. 1981), *cert. denied*, 455 U.S. 1019 (1982): "Specific intent to monopolize the relevant market is a necessary element of conspiracy to monopolize."

Fourth Circuit: *American Football League v. National Football League*, 323 F.2d 124, 132 n.18 (4th Cir. 1963): "It is elementary that in order to find the offense of conspiracy or attempt to monopolize, there must be a specific subjective intent to gain an illegal degree of market control."

Fifth Circuit: *Associated Radio Service Co. v. Page Airways, Inc.*, 624 F.2d 1342, 1348 (5th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981): "[O]ne of the necessary elements of a Section 2 violation is the possession of or conspiracy or attempt to acquire monopoly power in a particular market."

Circuits holding proof of relevant market unnecessary

Ninth Circuit: *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919, 926 (9th Cir. 1980), *cert. denied*, 450 U.S. 921 (1981): "[N]o particular level of market power or 'dangerous probability of success' has to be alleged or proved in a conspiracy claim where the specific intent to monopolize is otherwise apparent from the character of the actions taken."

Tenth Circuit: *Salco Corp. v. General Motors Corp.*, 517 F.2d 567, 576 (10th Cir. 1975): "Specific intent to monopolize is the heart of a conspiracy charge, and a plaintiff is not required to prove what is the 'relevant market.'"

Seventh Circuit: *United States v. National City Lines, Inc.*, 186 F.2d 562, 566-68 (7th Cir.), *cert. denied*, 341 U.S. 916 (1951). This older decision appears to support the position that proof of relevant market is unnecessary.

Circuits holding proof of relevant market necessary

Eleventh Circuit: *Bill Beasley Farms, Inc. v. Hubbard Farms*, 695 F.2d 1341, 1343 (11th Cir. 1983): "In this circuit it is clear that relevant market is a necessary element of conspiracy to monopolize."

District of Columbia Circuit: *Packard Motor Car Co. v. Webster Motor Car Co.*, 243 F.2d 418, 420 (D.C. Cir.), *cert. denied*, 355 U.S. 822 (1957): "[T]here is no evidence of any attempt or conspiracy to create a monopoly, since there is no evidence of any attempt to get control of the relevant market."

Circuits holding proof of relevant market unnecessary

Sixth Circuit: *Richter Concrete Corp. v. Hilltop Concrete Corp.*, 691 F.2d 818, 827-28 (6th Cir. 1982), expressly adopting the lower court opinion which stated, 547 F. Supp. 893, 915 (S.D. Ohio 1981): "[I]t is not necessary to consider the relevant markets . . . in Section 2 conspiracy cases."

Second Circuit: *United States v. Consolidated Laundries Corp.*, 291 F.2d 563, 573 (2d Cir. 1961): "[I]n a monopolization case the market must be proved. . . . But where the charge is conspiracy to monopolize, the essential element is not the power, but the specific intent, to monopolize. . . . Hence it is enough if some appreciable part of interstate commerce is the subject of the conspiracy. *United States v. Yellow Cab Co.*, 332 U.S. 218, 225-226."

Circuits holding proof of relevant market necessary	Circuits holding proof of relevant market unnecessary
Second Circuit: *Hudson Valley Asbestos Corp. v. Tougher Heating & Plumbing Co.*, 510 F.2d 1140, 1144 (2d Cir.), *cert. denied*, 421 U.S. 1011 (1975): "[T]he market at which the alleged conspiracy [to monopolize] was supposedly directed is not precisely defined"; *Karlinsky v. New York Racing Association*, 517 F.2d 1010, 1012 (2d Cir. 1975): "[T]he plaintiffs' theory is that defendants have combined or conspired to monopolize. . . . However, the record fails to establish that the New York tracks constitute a relevant competitive market for Sherman Act purposes."	[**Note:** The foregoing decisions of the Eighth, Ninth and Tenth Circuits, as well as the lower court opinion adopted by the Sixth Circuit, are predicated on the above-quoted language from the Second Circuit's *Consolidated Laundries Corp.* case. But two recent Second Circuit cases, noted in the opposite column, cast great doubt on whether the Eighth Circuit and others have read *Consolidated Laundries* correctly.]

The Eighth Circuit's ruling in the instant case that a Section 2 conspiracy to monopolize "generally does not require proof of a relevant market" places it for the first time in the second column above. It is thus in direct conflict with the Third, Fourth, Fifth, Eleventh, and District of Columbia Circuits, and probably with the Second Circuit. The issue is an important and recurring one in Section 2 cases. Moreover, Petitioner has found no other

cases in which the question has been directly presented to this Court in the last thirty years. The issue of whether proof of relevant market is necessary in a conspiracy to monopolize case is therefore particularly ripe for resolution in the present case.

B. Need for Proof of Relevant Market Under the Antitrust Laws

The Eighth Circuit's decision to dispense with the requirement of establishing relevant market in a conspiracy to monopolize case is fundamentally at odds with the principles of antitrust law. This Court has consistently held that it is *only* in the context of a relevant market that any effect on competition can be measured. *See, e.g., Associated General Contractors of California, Inc. v. California State Council of Carpenters,* 51 U.S.L.W. 4139, 4144 (U.S., Feb. 22, 1983); *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.,* 382 U.S. 172, 177 (1965). And, as has been repeatedly noted by this Court, the antitrust laws were engineered to protect *competition,* not competitors. *See, e.g., Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477, 488 (1977) (quoting *Brown Shoe Co. v. United States,* 370 U.S. 294, 320 (1962)).

The very language of Section 2 of the Sherman Act strongly confirms that all Section 2 violations have identical market requirements. That statute provides, 15 U.S.C. §2:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize *any part of the trade or commerce* among the several States, or with foreign nations, shall be deemed guilty. . . . (Emphasis added).

The emphasized language has been repeatedly held to require definition of relevant market in monopoly and attempted monopoly cases. *See, e.g., United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966); *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 177 (1965). No linguistic or grammatical distinction may be drawn between monopoly and attempt to monopolize cases on the one hand, and conspiracy to monopolize cases on the other. Yet those courts holding that no proof of relevant market is required in conspiracy to monopolize cases have inexplicably ignored this internally consistent language in favor of a contradiction—that "any part of the trade or commerce" means one thing in a conspiracy to monopolize case, and another in a monopoly or attempt to monopolize case.

The confusion apparently stems from language found in two older Supreme Court cases, *United States v. Yellow Cab Co.*, 332 U.S. 218, 225-26 (1947), and *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 n.23 (1956). In the former case, the Court was concerned with the *amount* of interstate commerce needed to establish subject matter jurisdiction in a Section 2 conspiracy to monopolize; in the latter, the Court was distinguishing earlier opinions not concerned with relevant market. Neither decision can properly be read as supporting the proposition that proof of relevant market is not required in a conspiracy to monopolize case. Nevertheless, these are the cases that the Eighth Circuit and others have used to support their reasoning that relevant market is not an element of conspiracy to monopolize.[11] The con-

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11. *See, e.g.*, 687 F.2d at 1181-82, App. A at 8a; *Salco Corp. v. General Motors Corp.*, 517 F.2d at 576; *United States v. Consolidated Laundries Corp.*, 291 F.2d at 573; *United States v. National City Lines, Inc.*, 186 F.2d at 567-68.

fusion caused by both of these Supreme Court cases is apparent in the Courts of Appeal cases. It can only be resolved by this Court, and the present case offers the ideal opportunity to do so.

This case graphically demonstrates the aberration caused by the Eighth Circuit's holding that no relevant market need be proven in a conspiracy to monopolize case. The Court ruled, 687 F.2d at 1193, App. A at 30a:

> Of course, an unlawful conspiracy under Section 2 necessarily violates Section 1 as an "unreasonable" restraint of trade.

While this may be true as a general proposition, to so hold in a situation where a Section 2 violation has been found without adequate proof of relevant geographic market results in a serious anomaly. One of the basic tenets of antitrust law is that in order to prove a violation of Section 1 of the Sherman Act, relevant product and geographic markets must be established,[12] unless the conduct falls within one of the few narrow exceptions recognized by this Court as *per se* violations.[13] In order to independently recover under Section 1, therefore, NFO would have been required to establish both a relevant product and geographic market, which NFO was unable to do. By virtue of the Eighth Circuit's holding, however, NFO has been able to accomplish by the back door what it could not by the front—recover against Petitioner Mid-Am and others on a "rule of reason" violation of Section 1 of the Sherman Act *without establishing a relevant market.*

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12. *See, e.g., Times-Picayune Publishing Co. v. United States,* 345 U.S. 594, 615 (1953).

13. Neither the District nor Circuit Court below found that NFO had established any independent violation of Section 1 of the Sherman Act, much less a *per se* violation. NFO made no claim and offered no proof at trial of any *per se* violation.

This holding by the Eighth Circuit has important and far-reaching consequences with respect to the antitrust laws. For the first time, an antitrust plaintiff has the opportunity to prove what amounts to a *per se* violation of *both* Sections 1 *and* 2 of the Sherman Act simply by demonstrating that two or more defendants "intended" to monopolize—without any need to show "what" or "where" that intent was focused in anything more than the most general manner.[14]

The Eighth Circuit's decision not only conflicts with the opinions of six other Circuits, but runs counter to the uniform judicial interpretation of Section 2 of the Sherman Act. It creates an anomaly within the antitrust laws. The decision should be reviewed and reversed by this Court.

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14. The Eighth Circuit did make a gesture of indicating that the market in which an alleged conspiracy occurs has some relevance, 687 F.2d at 1182, App. A at 8a:

> In our view, a civil Section 2 conspiracy claim, standing alone, does require a *minimal* showing of product and geographic context—what and where the alleged conspiracy is focused—to ensure that a claim is not based upon some abstract showing of unlawful intent. The nature of such proof, however, is *simply to show the context of the conspiracy*. It need not be as rigorous as the relevant market showing for other Section 2 claims, because actual attainment or "dangerous probability" of monopoly power is not an issue in a conspiracy claim. (Emphasis added).

In applying this vague test to the facts presented at trial, the Eighth Circuit concluded that, 687 F.2d at 1192, App. A at 29a:

> We thus are presented with the certainty, on this record, that AMPI, CMPC and Mid-Am are the major marketers of raw milk produced in the Midwest, but with uncertainty as to monopoly power in a properly defined market or submarkets.

At no point does the Eighth Circuit come closer to defining a relevant geographic market than the general term "Midwest," which has no commonly accepted meaning.

II. The Decision Below Imposes Significant Limitations on the Noerr-Pennington Doctrine and the Capper-Volstead Act.

The Court of Appeals' *de novo* finding that AMPI, CMPC and Mid-Am conspired with each other to monopolize was based directly on joint conduct of the defendants that was concededly exempt from antitrust scrutiny under both the *Noerr-Pennington* doctrine previously recognized by this Court in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), and the Capper-Volstead Act, 7 U.S.C. §291. The Court of Appeals' holding severely weakens, if not destroys, both antitrust exemptions, and review by this Court is essential to protect their viability.

The Court of Appeals simply constructed from the record on appeal a web of "conspiracy" out of individual strands of conduct that were, as the Court itself repeatedly acknowledged, exempt from all antitrust consideration. Although continually and correctly recognizing that the joint activity of the defendants was protected, and could never itself constitute an antitrust violation in view of both the *Noerr-Pennington* doctrine and the Capper-Volstead Act, the Court nevertheless proceeded to find just such a violation by viewing this same exempt joint activity "as a whole" and as part of a "pattern of conduct" that included admittedly unilateral actions of individual defendants. 687 F.2d at 1192-1208, App. A at 29a-61a. As the Court noted, 687 F.2d at 1194, App. A at 32a:

> The specific overt acts of the defendants must be viewed in light of their concerted marketing practices *as a whole*. (Emphasis added).

Of course, these very "concerted marketing practices" are *exempt* from antitrust scrutiny under both this Court's prior decisions and the Capper-Volstead Act. There is no evidence of any "conspiracy" in this case apart from such exempt activity.

The decision below cannot be reconciled with the established *Noerr-Pennington* doctrine that joint efforts to influence public officials do not violate the antitrust laws. While not directly contradicting that doctrine, the Eighth Circuit has effectively undercut it by seizing upon certain footnote dicta in *United Mine Workers v. Pennington*, 381 U.S. at 670 n.3, to the effect that exempt conduct may be used to show the "purpose and character" of other non-exempt activity.[15] The Eighth Circuit has misused the footnote dicta to construct the following limitation or exception to the *Noerr-Pennington* doctrine, 687 F.2d at 1196, App. A at 36a:

> Exempt conduct may be considered, however, to the extent it tends to show the "purpose or character" [sic] of other, nonexempt activity. *United Mine Workers v. Pennington, supra*, 381 U.S. at 671 [sic] n.3 [other lower court citations omitted]. Here, the district court's findings are noteworthy because they show CMPC, AMPI and Mid-Am acting in concert

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15. The *Pennington* footnote reads, 381 U.S. at 670:

> It would of course still be within the province of the trial judge to admit this evidence, if he deemed it probative and not unduly prejudicial, under the "established judicial rule of evidence that testimony of prior or subsequent transactions, which for some reason are barred from forming the basis for a suit, may nevertheless be introduced if it tends reasonably to show the purpose and character of the particular transactions under scrutiny." (Citations omitted).

The *Pennington* footnote permits use of exempt conduct only to show the nature of other independently-established joint activity. The Eighth Circuit, however, has twisted this language to derive the very existence of conspiracy from exempt conduct.

> with the specific intent to block NFO from competing as a qualified cooperative. While not illegal because of the exemption, this conduct does have evidentiary value as to the purpose and *concerted* character of these co-ops' contemporaneous nonexempt activities. (Emphasis added).

The difficulty here is that there were no "contemporaneous nonexempt activities" that involved the *joint* conduct of CMPC, AMPI and Mid-Am. The Eighth Circuit's *de novo* finding of conspiracy was based exclusively on the "purpose or character" said to flow from the *Noerr-Pennington* exempt activity, and *individual* acts of the defendants. In other words, strictly unilateral activities were held to be conspiratorial in nature based solely on exempt conduct.

By using exempt conduct to establish a broader nonexempt conspiracy, the Eighth Circuit stands the *Noerr-Pennington* doctrine on its head. The plain fact is that this case is controlled by the *principal* holding in *Pennington*, rather than the dicta in footnote 3 of that opinion. In *Pennington*, the trial court had allowed the jury to find an illegal conspiracy from the anticompetitive intent adhering to a joint petitioning of public officials. This Court reversed, holding, 381 U.S. at 670:

> Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone *or as part of a broader scheme itself violative of the Sherman Act.* (Emphasis added).

Here there was no broader scheme "itself" violative of the Sherman Act; the very existence of a conspiracy, and thus of an antitrust violation, was derived from exempt conduct. This is precisely what *Pennington* prohibits.

Similarly, the Court of Appeals attempted to use activity which it conceded was exempt under the Capper-Volstead Act to support its finding of conspiracy. The Court once again admitted that the concerted activity in this case was legal, 687 F.2d at 1193, App. A at 30a-31a:

> Here, the defendants do not seriously dispute, nor could they on this record, that they acted in concert with the intent to eliminate competition and gain sufficient control of milk to enable them to set higher prices. *They properly argue that such intent is not unlawful, standing alone, because Capper-Volstead cooperatives may agree to eliminate competition between themselves and to pursue monopoly power through lawful means.* (Footnote omitted) (Emphasis added).

Yet the Court then took this same concededly exempt activity "as a whole," 687 F.2d at 1207, App. A at 59a, and constructed an antitrust violation.

To use lawful Capper-Volstead and *Noerr-Pennington* exempt activity as the sole basis to support a finding of conspiracy, as the Court of Appeals has done, is to strip these exemptions of all force. Review must be granted to preserve the integrity of both exemptions.

III. The Decision Below Broadens the Capper-Volstead Act Antitrust Exemption Set Forth by This Court in the National Broiler Case.

The Court of Appeals' decision that Mid-Am could not recover from NFO for illegal price fixing significantly extends the "limited" antitrust exemption recognized by this Court in *National Broiler Marketing Association v. United States*, 436 U.S. 816 (1978).[16] There this Court

16. One possible interpretation of the decision below is that the Eighth Circuit refused to apply *National Broiler* at all to the facts of this case, indicating instead that the 1978 decision of

(Continued on following page)

announced the straightforward test that even *one* "non-farmer" member in a cooperative disqualifies that cooperative from the Capper-Volstead Act antitrust exemption. As stated by this Court, 436 U.S. at 822-23, 828-29:

> The Capper-Volstead Act removed from the proscription of the antitrust laws cooperatives formed by certain agricultural producers that otherwise would be directly competing with each other in efforts to bring their goods to market. But if the cooperative includes among its members those not so privileged under the statute to act collectively, it is not entitled to the protection of the Act. Thus, in order for NBMA to enjoy the limited exemption of the Capper-Volstead Act, and, as a consequence, to avoid liability under the antitrust laws for its collective activity, *all* its members must be qualified to act collectively. It is not enough that a typical member qualify, or even that most of the NBMA's members qualify. . . . We hold that such members [those who process rather than grow chickens] are not "farmers," as that term is used in the Act, and that a cooperative organization that includes them—or even one of them—as members is not entitled to the limited protection of the Capper-Volstead Act. (Footnote and citation omitted) (Emphasis original).

While conceding that it was a "close question," the Eighth Circuit chose not to use the simple "non-farmer"

Footnote continued—
this Court should not be applied retroactively to NFO's actions in the late 1960's and early 1970's. 687 F.2d at 1187, App. A at 17a-18a. This reading seems implausible, however, in light of the Eighth Circuit's extensive discussion and novel interpretation of the *National Broiler* holding. 687 F.2d at 1185-87, App. A at 14a-18a. In any event, it would have been clear error for the Court below to refuse to apply the *National Broiler* decision retroactively in this case, particularly in light of this Court's 1967 holding in *Case-Swayne, infra*. *See, e.g., Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971).

test of *National Broiler*. The Court instead interpreted *National Broiler*, as well as the earlier decision in *Case-Swayne Co., Inc. v. Sunkist Growers, Inc.*, 389 U.S. 384 (1967), as holding that an agricultural cooperative loses its Capper-Volstead exemption only if it has non-farmer members who are also "middlemen." The Court thus rejected or revised the *National Broiler* proposition "that a cooperative organization that includes them [non-farmers]—or even one of them—as members is not entitled to the limited protection of the Capper-Volstead Act."

In this case, NFO concededly had a number of non-farmer members who were entirely foreign to the milk production industry, including a car dealer, a truck driver, a fertilizer salesman, a school teacher, a retired farmer, a television salesman, and a telephone company employee. 687 F.2d at 1186, App. A at 17a. This case thus presents the novel and important question of whether the *National Broiler* exemption is unavailable to any agricultural cooperative that has non-farmer members, or whether only those cooperatives having non-farmer "middlemen" members are subject to the antitrust laws.

Common sense as well as the policies underlying the Capper-Volstead Act would indicate that the *National Broiler* test should have been applied to any cooperative that has a single non-farmer member, regardless of the "middleman" status of that non-farmer. Why should a car salesman be "qualified to act collectively," as a member of a cooperative, in conduct that would otherwise violate the antitrust laws? Why should a cooperative escape antitrust liability simply by excluding "middlemen" from its membership rolls, while reaching out to include substantial numbers of "non-middlemen non-farmers?"

In a real sense, the Eighth Circuit has transformed the quantitative "non-farmer" test of *National Broiler* into

a qualitative "non-middleman" test. If the *National Broiler* test is to be modified or limited, only this Court should do so. Review of the Eighth Circuit's holding by this Court is therefore essential.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

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